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IN THE

Supreme Court of the United States

October Term 1965

No. 340

ANTHONY R. FERNICOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner Anthony R. Fernicola, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 13, 1966 which judgment affirmed a judgment of sentence of the United States District Court for the District of New Jersey of April 9, 1965, filed April 14, 1965.

Citations to Opinion Below

The opinion of the Court of Appeals printed in Appendix B hereto, infra, has not as yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Were not the principals laid down in Holland v. United States, 348 U.S. 121 (1954), violated where, in a net worth income tax prosecution, (a) petitioner was credited with no cash on hand at the starting point despite undisputed proof of his expenditure of a large amount of cash at that time, (b) where a defense "lead" was disallowed despite overwhelming evidence that it had not been adequately investigated, and (c) where the government summary introduced in evidence failed to credit petitioner with any money earned from his profession during the critical pre-indictment years?

2. Was not petitioner's right to be free of adverse inferences on his failure to testify violated where government counsel, in summation, made reference to the fact that petitioner's wife did not take the stand, and indirect references to petitioner's failure to testify?

3. Did not the Government's summation deny petitioner a fair trial where it made numerous references to personal belief in the falsity of crucial defense evidence, where it charged defendant counsel with manufacturing this evidence and suborning perjury, and made numerous references to the failure of petitioner and his wife to testify?

Statute Involved

The statutory provision involved is 26 U.S.C. Section 7201. It is printed in Appendix A, infra.

Statement

On April 4, 1962, the petitioner, Dr. Anthony R. Fernicola, was indicted by the Grand Jury in and for the District of New Jersey on three counts of violating Section 7201 of the Internal Revenue Code; income tax evasion. Each count represented one year of the years ending December 31, 1955, 1956 and 1957 (1a-2 to 5).* The government tried this case upon the net worth and cash expenditure method of proof by introducing testimony and documents in evidence with respect to the petitioner's net worth from December 31, 1950 through December 31, 1957. The government also offered proof of the petitioner's non-deductible expenditures during the period referred to above. All of the evidence, both testimonial and documentary, was summarized on a schedule which was entered in evidence as G-90 (500a-513a).

In order to establish the petitioner's net worth at the beginning of the first indictment year, the government chose December 31, 1950 as its point and place of beginning and attempted to establish petitioner's net worth at that time and then work forward to the first indictment year. The government selected 1950 as a starting point because petitioner commenced his practice of medicine on August 18 of that year, and, according to the government, had no earning history prior to that time (74a).

As of December 31, 1950 the government

* "a" refers to the appellant's appendix in the Circuit Court of Appeals, which Appendix has been certified and filed with this petition as a part of the official record below.

attributed a net worth of $12,459.19 to the petitioner made up of the following assets: Balance in checking account $74.35; office furniture and equipment $11,022.68; automobile $2,000; less depreciation. The proofs showed, however, that in August 1950 petitioner spent $11,000 in cash to open his office and purchased an automible for $2,000. Yet, despite these substantial cash expenditures petitioner was credited with zero cash on hand at the starting point (109a-111a, Exh. G-90). The government's chief witness admitted that he knew nothing of petitioner's assets prior to August 1950 (109a). He also stated, consequently, that he did not know the source of the funds used to furnish the office and purchase the automobile (116a-117a, 194a-197a).

To account for his alleged net worth increases during 1955, 1956 and 1957 petitioner's representatives furnished the government with explanations or "leads" on four occasions prior to trial. Three times the government was advised that petitioner had received cash gifts from his father, the third time, over a month before trial, specifying a cash hoard of $81,000 delivered to petitioner after his father's death (320a-323a). The government disallowed the claimed $81,000 on the grounds that it had not been declared on the father's State Inheritance Tax return and, further, that the elder Fernicola did not possess sufficient wealth to accumulate such a hoard (134a-138a). In this connection the government's chief witness, an internal revenue service agent, stated that he did not know how the elder Fernicola earned his living from 1930 to the date of his death in 1953 (313a); that he did not know where the father lived from 1947 to 1953 (313a); that he never contacted any of the mortgagors who had borrowed from the father

(151a-162a); that he did not know where petitioner received $13,000 to open his medical practice in 1950 (194a); that, though he knew petitioner attended a private preparatory school, Georgetown University, Georgetown Medical School, and the University of Pennsylvania for graduate work, and served an internship and residency in Newark, all between 1937 and 1950, and knew that the father supported him during that time, he never visited any of these schools to determine the amounts of tuition and how they were paid or how petitioner lived during these years (102a-109a); that he only examined property records as to the elder Fernicola's holdings from 1930 onwards, though the father was already 64 years old in 1930 (313a); that, having knowledge of the father's reputation as a money lender and bail bondsman, he never checked into these facts (95a-96a); and that during the years 1937 and 1953, when the father was claimed to be inactive (134a), his savings accounts increased by $25,000 (144a-145a). Resting on these facts the government contended that it had negatived the "lead" of $81,000.

The government summarized its proof in an exhibit which became G-90 in evidence (256a-257a). In making its computations concerning petitioner's net worth on this summary the government failed to make any allowance for petitioner's income earned and reported during the period August 1950 to December 31, 1954, less his cash expenditures during that period in order to determine additional cash on hand derived from his practice of medicine (229a). The government's own chief witness acknowledged the error of his summary (202a-229a).

Though petitioner's wife was not a defendant

in this case, her name was on each of the joint returns which formed the basis of the indictments. Neither she nor petitioner took the stand in his defense. Despite this, the Assistant United States Attorney in his summation, made continual reference, both direct and indirect to the failure of petitioner and his wife to testify. In the guise of commenting upon the absence of a certain entry in the petitioner's tax return for 1954 the government counsel five times used the phrase "Dr. Fernicola doesn't say so" (438a, 439a, 440a, 442a-443a), though on all but one occasion the tax return was not even mentioned. In addition, there were three direct and explicit comments concerning the failure of petitioner's wife to testify (451a-453a-454a). Defense counsel was continually challenged to "put Mrs. Fernicola on that stand." Government counsel also referred to the fact that "the defense is not obligated to put in any case at all" or "to explain anything" (455a-456a). Reference was also made to the fact that certain testimony was uncorroborated, though only petitioner could have made this corroboration (474a). Further in the summation, defense counsel was accused of "contriving" the defense of a cash hoard. This was not an attack on the evidence but directly on defense counsel, by name (471a, 473a, 491a). The heart of the comment was as follows:

> "Mr. Querques comes into the case in September of this year. The case is put down for trial. He gets a copy of the indictment, and any trial lawyer reading that indictment is going to see from the indictment that the magic number is seventy-five

thousand dollars. Any lawyer taking this case to trial has got to come up with seventy-five thousand dollars of a cash hoard prior to that first tax year, to beat the case, so the quest goes on for seventy-five thousand dollars of non-taxable income, non-taxable funds to explain the discrepancy, to explain away all these cash expenditures..." (471a).

"Isn't this a last-ditch stand? Isn't this a defense contrived for trial--and yes--I'll use the term, Isn't this manufactured evidence?" (473a).

Since there was direct testimony presented as to the existence of this cash hoard (374a-375a), these comments amounted to an accusation that defense counsel had suborned perjury. In addition, the Assistant United States Attorney continually made reference to his personal belief in the falsity of crucial defense evidence, during his summation (445a, 446a, 447a, 448a, 491a). Typical of these was the comment: "Well, if you disbelieve the tin box of Gerardo Fernicola, as I do, -- I don't believe that it ever existed -- (474a)." All of these various objections to the summation were brought to the Court's attention at the time (443a-444a, 492a-494a).

Reasons for Granting the Writ

1. Except for the per curiam opinion in Massei v. United States, 355 U.S. 595 (1958), this Court has not examined a net worth income tax case since the guiding principles were laid down in Holland v. United States, 348 U.S. 121 (1954). This case indicates that the Government has not

heeded the Court's warning to exercise "great care and restraint" in such a prosecution. In its attempt to establish an opening net worth, the government did not credit the petitioner with any cash on hand, in the form of currency. Though petitioner had no earning history prior to the date selected as the point of beginning and had filed no tax returns prior to that year, it was undisputed that he disbursed approximately $13,000 in cash to open his medical office and to purchase a car at the starting point in 1950. The government agent here admitted that he did not know the source of this $13,000 in cash, and, in fact, knew nothing of petitioner's assets prior to the starting point. Here the government's own evidence refuted the zero cash on hand attributed to petitioner in attempting to establish with "reasonable certainty" the opening net worth, as required by Holland v. United States, supra. Furthermore, the record clearly indicated a failure to adequately investigate the validity of a "lead" given to the government by petitioner in explanation of his apparent net worth increases. In Holland v. United States, supra, this Court merely stated that such leads may be considered as true when the government "fails to show an investigation" into their validity. 348 U.S. at 136. Petitioner's case indicates that further guidance is required in determining the extent to which the government must go in making such an investigation. In this case the government disallowed a lead, pertaining to an $81,000 cash hoard left to petitioner by his father, on the ostensible ground that the father could not have amassed such wealth. Though the government indicated an awareness of facts which might have shown such wealth, it admittedly did not pursue them to a conclusion. Petitioner does not question that an

investigation was made, but urges that Holland required more and, failing that, the lead should have been deemed true. In addition, the gross error in the government's summary, in failing to account for petitioner's earnings in the pre-indictment years and thus failing to correctly state his net worth at the beginning of the year 1955, was particularly prejudicial in the light of this court's stricture in Holland, supra, at 128, that "bare figures have a way of acquiring an existence of their own." By sanctioning the procedure followed here the Third Circuit brings itself into seeming opposition with the Second Circuit on this question of the prejudicial nature of such summaries when they are shown to contain errors. United States v. Altruda, 224 F.2d 935 (2 Cir. 1955). Petitioner's case indicates that Holland did not eliminate all the problems in the net worth income tax prosecution and that clarification of the guidelines set out in that case are now required after twelve years of silence in this area of major concern to both the government and the individual taxpayer.

2. In his summation the Assistant United States Attorney violated petitioner's right to be free of comment on his failure to testify. The comments involved here were of an indirect nature involving ostensible references to statements made on petitioner's tax returns and direct comments concerning the failure of petitioner's wife, whose name appeared on all the tax returns involved, and who was not a defendant, to take the stand. These numerous references to the fact that, "Dr. Fernicola doesn't say so" and the direct challenges to put the petitioner's wife on the stand were part of a well-conceived plan to violate petitioner's Fifth Amendment privilege. Though the prohibition

against direct comment has been well established since Wilson v. United States, 149 U.S. 60 (1892) and reiterated recently in Griffin v. California, 380 U.S. 609 (1965), courts continue to be troubled by varieties of indirect comment on the failure of an accused to testify, of which this case presents an extreme example. Both lower federal courts and state courts need guidance on the extent to which this constitutional principle should be applied. In addition to the type of remarks cited above, government counsel also commented that the defense "was not obligated to put in any case at all" and "are not obligated to explain anything," and made further reference to the uncorroborated nature of certain testimony which only petitioner could have substantiated. In totality these series of remarks robbed the petitioner of a valuable constitutional right. To say that such a contention is "without merit" as did the court below, without discussion, is to indicate a lack of compliance with, or understanding of, this court's mandate, and calls for rectification, both for justice's sake and for the guidance of every court in our country.

3. In addition to the above comments, government counsel in his summation directly accused defense counsel, by name, of suborning perjury and at least six times asserted his personal belief in the falsity of certain crucial defense contentions. Even when taken individually, but especially when considered collectively, these comments were grossly unfair and prejudicial to the petitioner's case at a time when he was powerless to meet them, and denied him a fair trial. Combined with the indirect violations of petitioner's right to be free of adverse inferences on his failure to testify, discussed above, this summation constituted conduct every bit as gross as that condemned in

Berger v. United States, 295 U.S. 78 (1935) and United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1939). Not within the last two decades has this court touched on the obligation of government counsel to refrain from striking foul blows. Berger v. United States, supra, at 88. To pass off these contentions as "without merit" is to completely ignore the commanding position of the government's representative at trial and to utterly fail to comprehend this court's pronouncements in the above cited cases. Other circuit courts have seen clearly reversible error in this type of conduct. See e.g. Agueci v. United States, 310 F.2d 817 (2 Cir. 1962), cert. denied, 372 U.S. 959; Wagner v. United States, 263 F.2d 877 (5 Cir. 1959); Greenberg v. United States, 280 F.2d 472 (1 Cir. 1960). The defense here was based on a contention of a prior cash hoard in a metal box delivered to petitioner by an uncle after his father's death. Government counsel's remarks concerning the manufacturing of this evidence by defense counsel and his expressions of personal disbelief in the existence of this cash hoard thus went to the most crucial aspect of the case. The remarks were intended to have a damaging effect and surely they did. For this court to sanction such conduct, as did the court below, is to invite a lowering of the high standards set many years ago in Berger v. United States, supra.

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Appendix A—
Statutory and Constitutional Provisions Involved

Federal Statutes

26 U.S.C. Section 7201. Attempt to evade or defeat tax.

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B—

Opinion of the United States Court of Appeals for the Third Circuit

(Filed June 13, 1966)

PER CURIAM:

Following a jury trial, defendant was found guilty on a three-count Indictment charging him with "wilfully and knowingly attempting to evade and defeat a large part of the income tax owing by him and his wife" for the years 1955, 1956 and 1957, and "filing and causing to be filed...a false and fraudulent joint income tax return" for the years stated.

Since the Government was unable to obtain from the defendant books or records of his medical practice reflecting payments of fees to him, it arrived at its calculations of the defendant's taxable income for the years involved via the "net worth" method and prosecuted its case at the trial in accordance therewith. Holland v. United States, 348 U.S. 121 (1954); United States v. Pepe, F.2d (3 Cir. 1966), decided May 12, 1966.

The hard core of the appellant's contention on this appeal is that the Government failed to satisfactorily prove a substantial understatement of income during the tax years in the critical respect that it failed to meet its burden of proof on the score of establishing an "opening net worth" or total net value of the appellant's assets at the beginning of the sequence of tax years for which a deficiency was alleged.

On review of the record we are of the opinion

that the appellant's contention is without merit and that there was ample basis for the jury's verdict. Other points presented by appellant with respect to alleged errors at the trial do not merit discussion.

For the reasons stated the judgment of sentence of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix C—

Judgment of the Court of Appeals Sought to be Reviewed

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ----- DISTRICT OF NEW JERSEY

Present: Kalodner and Hastie, Circuit Judges, and Wright, District Judge.

Judgment

This cause came on to be heard on the record from the United States District Court for the ----- District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 14, 1965, be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF
Clerk

June 13, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 340

ANTHONY R. FERNICOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 13–14) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1966 (Pet. 13). The petition for a writ of certiorari was filed on July 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

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2. Whether the prosecutor commented on petitioner's failure to testify.

3. Whether petitioner was denied a fair trial by the prosecutor's statement in summation that he did not believe in the existence of an $81,000 cash hoard claimed to have been received by petitioner from his father's estate.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C. 7201):

ATTEMPT TO EVADE OR DEFEAT TAX

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

On April 4, 1962, petitioner was indicted in the United States District Court for the District of New Jersey on three counts of willfully attempting to evade individual income taxes for the years 1955 through 1957, in violation of Section 7201 of the Internal Revenue Code of 1954. The indictment alleged total unreported income of $75,017.95 for the three years. (R. 1a–2 through 1a–5.) After a trial by jury, petitioner was found guilty on all counts and fined $10,000 on each (R. 514a).

1. Since no records of petitioner's medical practice were ever made available to either the government or the accountant who prepared the tax returns—all the

information on the returns being furnished by petitioner himself—the government was obliged to rely upon the net-worth method of establishing petitioner's income. (R. 6b, 10b, 34b–35b.) As foundation, the government showed that petitioner had filed no income tax returns prior to 1950 (R. 74a; Pet. 8); he had begun his medical practice in August 1950 (R. 74a); prior thereto he had been an intern and, earlier, had attended various colleges and universities, and had a history of low earnings (R. 74a); for the year and a half prior to the opening of his office, he had earned $30 a month (R. 58b–59b); his net worth at the end of 1950 was $12,459.19 (R. 75a); his net worth at the end of 1954 (the beginning of the prosecution years) was $33,124.30 (R. 83a, 510a) and had increased by $20,655.11 during this five-year pre-indictment period, during which he had reported a total of income after taxes of $27,808 (R. 269b–273b). The government then showed, on the basis of increases in petitioner's net worth, and non-deductible expenditures, that during the prosecution years (1955–1957) petitioner had had unreported income totalling $68,230.02 (R. 510a).

2. The principal issue at trial revolved around petitioner's claim that the increase in net worth upon which the government's case was predicated could be explained by an $81,000 "cash hoard" that he claimed to have received from his father. The background to the issue is as follows. Beginning in 1959 petitioner or his representatives had at least six meetings with representatives of the Internal Revenue Service. Five

of these meetings occurred prior to the return of the indictment in April 1962 (R. 564, 76b). In August 1960 his representatives stated that he had received money from his father or his wife, but no amount was stated, and no particular occasion was described (R. 77b). In January 1961 his representatives stated that he had received $23,000 from his father's total estate of $29,000 and a $50,000 cash gift from his wife which she allegedly had accumulated as a result of black-market operations carried on by her in Africa while employed as an airline stewardess (R. 262a, 288a, 78b). Investigation revealed—and the defense ultimately conceded—that the father's estate had been divided equally among the four sons, and that petitioner's share was not $23,000 but $6,500.17 (R. 85b–86b, 278b–284b).[1] In March 1962, petitioner's representatives advised the government that he had accumulated funds prior to the prosecution years from three sources: his practice of medicine, the $50,000 cash gift from the wife, and cash gifts alleged to have made to him by his father prior to his death (R. 299a–302a).

It was not until November 1964—more than two years after the indictment had been brought—that the defense first advanced the contention that petitioner had received $81,000 in a cash hoard subsequent to his father's death (R. 83b–84b). The defense relied upon the uncorroborated deposition of George Saracino, also known as George Morello, peti-

[1] The government was unable to disprove the $50,000 alleged cash gift from petitioner's wife and therefore gave petitioner credit for that amount (R. 290a, 78b).

tioner's uncle, who testified that he had lived with petitioner's father and upon the latter's death in 1953 had given petitioner a large metal box that had been kept in the apartment by the father and contained at least $75,000 in bills of $10, $20, $50 and $100 denominations (R. 369a, 374a–375a, 379a–380a, 390a–391a, 168b, 169b, 188b). The government relied upon the probate records of the father's estate, which showed a gross estate of $28,653.67 (R. 280b); the records of the bonding company, indicating that petitioner had received $6,500.17 from that estate (R. 85b–86b); petitioner's signature on an approval of an accounting, which showed a gross estate in the amount of $28,653.67 (R. 278b, 281b); the State inheritance tax returns, which showed a total estate of $32,252.65 (R. 283b); and the fact that it was not until the case was calendared for trial that the claim regarding this large cash hoard was first advanced (R. 84b). It was shown, further, that no federal estate tax return had been filed on behalf of the father; nor had any gift tax return ever been filed listing petitioner's father as donor or petitioner as donee (R. 2b). And, although the petitioner's sister-in-law, his cousin and a cleaning woman were frequent visitors to the apartment in which the metal box was allegedly kept, none of them had ever seen such a box (R. 170b, 183b, 187b).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 5, 7–9) that the evidence was insufficient to support the verdict. The burden of establishing a reasonably

accurate opening net worth (*Holland* v. *United States*, 348 U.S. 121, 132) was amply met (Statement, *supra*, p. 3); the argument that petitioner was not given credit for the earnings from his medical practice prior to the indictment period has no basis (see R. 63b–71b, 95b–96b). During the pre-indictment period in question petitioner's total net earnings were only $27,808.00; even if he spent as little as $2,000 a year on living expenses his net worth surely could not have increased in this period by more than the government's figure of $20,665.11 (see Statement, *supra*, pp. 3–5). As for the contention that the government should have credited petitioner with the alleged $81,000 "cash hoard", the record clearly shows the insubstantiality of that claim. Its belated assertion as well as its inherent incredibility in light of the total circumstances justified the government—and the jury—in disbelieving in its existence (Statement, *supra*, pp. 3–5).

2. The argument (Pet. 6, 9–10) that the prosecutor commented on the failure of petitioner to testify is also unsupported. In his summation to the jury petitioner's counsel referred to a $10,000 contribution allegedly made by petitioner to a church in 1954, and argued that this tended to show petitioner had had a large amount of cash on hand (R. 204b–208b). In his 1954 income tax return, however, petitioner—although he itemized many charitable contributions in far smaller amounts—did not claim the alleged $10,000 contribution or any part thereof (R. 274b). It was this and this alone that the prosecutor was re-

ferring to when he told the jury "Dr. Fernicola doesn't say so." (R. 439a–443a.) When an objection was made, (outside of the jury's presence) the judge correctly pointed out that the remark had reference merely to what petitioner had or had not said in his tax return (R. 443a–444a). This was what the jury thought and what the prosecutor intended. There was thus no comment on petitioner's failure to testify. Cf. *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10); *United States* v. *Fay*, 349 F. 2d 957, 961 (C.A. 2), certiorari denied, 377 U.S. 936. Indeed, the court specifically charged the jury, in the language requested by petitioner, that no inference of any kind could be drawn from his failure to testify (R. 190b, 263b).

The prosecutor's comment on the failure of petitioner's wife to testify (R. 451a–454a) was not improper. She was not the defendant. Moreover, the comment was invited by the departure of the defense from its stipulation that the cash gift made to petitioner by his wife in 1955 had been $50,000 (R. 33b–34b). The defense sought to make it appear that the gift had been at least $50,000 and perhaps $125,000 (R. 45b–47b, 52b–53b). The prosecutor pointed out, quite properly, that if the wife had in fact given more than the stipulated $50,000 amount the proper way to show it would have been to put her on the witness stand (R. 451a–454a). This was not error. *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10).

3. Also without merit is petitioner's final contention (Pet. 6–7, 10–11) that the prosecutor practically

accused him of suborning perjury in connection with the testimony about the cash hoard and asserted his personal belief in the falsity of that testimony. Doubtless a certain amount of acrimony did creep into this trial (see *e.g.*, the summation of defense counsel, attacking the good faith of the government, particularly of the Treasury agent who investigated the case (R. 194b–195b, 198b, 207b, 212b, 220b–224b, 229b)). At one point in the trial petitioner's counsel had to be reprimanded by the judge, outside the jury's presence, for virtually accusing the prosecutor of lying (R. 493a–494a). It is in this setting that the prosecutor's remarks must be considered. Viewed in context they did not, as was the case in *Berger* v. *United States*, 295 U.S. 78, 84–88, suggest that the prosecutor was in possession of special knowledge unknown to the jury and not introduced into evidence. A reading of the prosecutor's summation (R. 433a–491a) will disclose that he based his expressions of belief upon facts in evidence. He repeatedly advised the jury that he had no personal knowledge and that the jury could consider only the evidence adduced in court (R. 434a–435a, 444a, 448a). This case is therefore like *Lawn* v. *United States*, 355 U.S. 339, where, in response to a somewhat similar contention, this Court said (355 U.S. at 359–360, n. 15):

> The Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury, and therefore it was not improper. Cf.

Henderson v. *United States,* 218 F. 2d 14, 19; *United States* v. *Holt,* 108 F. 2d 365, 370; *Tuckerman* v. *United States,* 291 F. 958, 969.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 340

ANTHONY R. FERNICOLA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER IN SUPPORT

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REPLY BRIEF FOR THE PETITIONER IN SUPPORT

Petitioner submits the following argument in reply to the Brief for the United States in Opposition.

1. Whether the Evidence Was Sufficient to Support the Verdict

As stated in *Smith* v. *United States*, 348 U.S. 147, 155 (1954), "Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the government"

cannot "succeed." *Holland* v. *United States,* 348 U.S. 131, 135 (1954), cited as authority for that proposition, states that when the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt.

Herein petitioner relied upon the existence of *inter vivos* gifts from his father, substantial cash brought to him by his marriage (some allowance based thereon being allowed by the Government) and the receipt by him on the death of his father of an approximate $81,000.00 cash hoard. On the record, the Government asserts that it has sufficiently carried the burden of establishing a reasonably accurate opening net worth, relying basically upon petitioner's total net earnings during the pre-indictment period in question.

In this connection, it must be noted that, after several years of (away from home) intensive education leading to a medical degree (the cost of which was paid from some source), petitioner opened his professional office in or about August of 1950. *At that time,* he purchased an automobile for *cash* ($2,000.00) and for *cash* ($11,022.68) purchased office furniture and fixtures. No explanation is offered by the Government as to the source of these expenditures and obviously, on the record made by the Government, the source of such expenditures could not have been taxable income. In 1953, after the death of his father, petitioner purchased for *cash* ($2,250.00) a new Oldsmobile and made a *cash* contribution of $500.00 to the American Legion Hospital. In 1954, petitioner made a political contribution in *cash* in the amount of ~~$100.00~~ $1,000.00 and in March of that year made a $10,000.00 *cash* gift

to the St. James Church. All of this was done by an individual who the Government asserts on January 1, 1951 and January 1, 1952 had no cash on hand and who on January 1, 1953 and January 1, 1954 is asserted to have had on hand no more cash than the respective amounts of $2,750.00 and $1,860.25.

Must it not here be said, therefore, that the very demonstrated lack of earnings prior to 1955, taken in light of heavy expenditures for away-from-home education, automobiles, office furniture and fixtures, and political and charitable contributions, aggregating a most substantial figure, points unmistakably to the fact that defendant did have a source of nontaxable funds and in a substantial amount which has not been directly refuted?

Further, on the record, must it not be said that the existence of such fund has not been indirectly refuted, as in *Holland,* by any showing of financial hardships suffered during its alleged existence? Still further, must it not be said that the Government, contrary to the situation in *Holland,* introduced no evidence to show that petitioner's business during the years involved was capable of producing more income than was reported?

It is submitted that in light of the record herein upon which the conviction was based, clarification of the guidelines set out in the *Holland* case is required.

2. Whether the Prosecutor Improperly Commented on the Failure of the Petitioner and His Wife to Testify

On four occasions, the Assistant United States Attorney, referring to the $10,000.00 cash donation from the defendant to St. James Church, and in his attempt

to negate the existence of "cash on hand," commented upon the defendant's failure to testify as follows:

"* * * *Who says* the money came from Dr. Fernicola's resources? (438a)

"* * * The only evidence we received was the evidence of a receipt of $10,000 turned over by [sic] the church to [sic] Dr. Fernicola. (439a)

"* * * and in referring to some of these documents *who says* that the $10,000 came from funds of Dr. Fernicola? Referring to Dr. Fernicola's 1954 income tax return, *he didn't say so* * * *. (439a)

"*Who says* the money came from Dr. Fernicola's own resources, *not Dr. Fernicola.* Well, if that $10,000 didn't come out of the pocket of Dr. Fernicola, where did it come from? And in that regard I want to call attention to the receipt, printed right at the bottom of it, 'contributions deductible for income tax purposes,' and they are and should be, *but Dr. Fernicola doesn't say so.* (440a)

"Where did that $10,000 come from? * * * (440a)

* * *

"This was a family affair * * *. (441a)

* * *

"The money was turned over by the doctor. The receipt goes to the doctor. The letter goes to the doctor. This is the St. James Centennial Fund letter, and the first memorial for $10,000, Dr. Anthony Fernicola. (442a)

* * *

"Why wouldn't the members of his family allow him, starting out in life, to make the contribution to achieve whatever renown and distinction and whatever credit inheres from so generous and

so handsome a contribution, $10,000, *but where did the $10,000 come from?* (442a)

"Did it come from Dr. Fernicola alone, *Dr. Fernicola who doesn't say so.*" (443a)

When an objection was made, the Judge (then outside the Jury's presence) overruled counsel on the ground that the remarks had reference only to what petitioner had or had not said in the tax return. The Government asserts that:

"This was what the jury thought and what the prosecutor intended." (Br. 7)

Regardless of what the prosecutor intended, the basic factor is what the Jury thought, or may reasonably have thought, he intended, and in only one instance was the remark limited to petitioner's failure to "say so" in his 1954 income tax return. *Knowles* v. *United States,* 224 F. 2d 168 (10 Cir. 1955) states that the test of improper comment and reversible error is whether the language used "was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." In the instant case, the language used was of such character and of such repetition that the Jury must necessarily have inferred that the failure of the petitioner to "say so" from the stand and under oath could be used against him in a determination of guilt.

In *Stone* v. *State,* 105 Ala. 60, 17 So. 114 (1895), defendant was being tried for arson. During the course of the prosecutor's argument to the Jury, he said: "He don't say he didn't do it." The language was held to constitute reversible error as being a com-

ment by counsel on the failure of the defendant to testify.

In *Wilson* v. *United States,* 149 U.S. 60 (1892), the prosecution stated:

> "* * * I want to say to you * * * that if I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime."

This Court stated that the statement intimated to the Jury as plainly as if said in so many words that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify.

Is the intimation here any less plain where, with respect to this contribution, the prosecutor repeatedly asserts that the defendant fails to say whether the contribution came from his resources? By such statement, was not the Jury's attention clearly, unmistakably and persistently called to the failure of the accused to take the stand? *Cf. Berger* v. *United States,* 295 U.S. 78, 89 (1935). Under those circumstances, the failure of the Court to cure the error by prompt instructions is ground for setting aside the conviction as a violation of petitioner's rights under the Fifth Amendment and its analog, section 3481 of Title 18, United States Code. *United States* v. *Hamilton,* 97 F. Supp. 123, 127 (D.C. W.Va. 1951); *Desmond* v. *United States,* 345 F. 2d 225, 226 (1 Cir. 1965); *United States* v. *Fay,* 349 F. 2d 957 (2 Cir. 1965); *Knowles* v. *United States, supra.* Petitioner's right in this respect is so well fixed that this Court in *Griffin* v. *California,* 380 U.S. 609 (1965) overruled, as being uncon-

stitutional, a state statute permitting comment as to the failure of the accused to testify.

Further, though the United States would reach its own favorable conclusion as to "what the Jury thought" with respect to these remarks, their natural effect was to prejudice petitioner's substantial rights so that "it must affirmatively appear from the record to be harmless in order for the conviction to be upheld." *San Fratello* v. *United States,* 340 F. 2d 560, 566 (5 Cir. 1965), citing *McCandless* v. *United States,* 298 U.S. 342, 347-348 (1935) and *Kotteakos* v. *United States,* 328 U.S. 750, 760 (1946).

Compounding the error in this respect was the prosecutor's comment on the failure of petitioner's wife to testify which the Government would brush aside with the comment: "She was not the defendant." (Br. 7)

Such position, however, is too naive. The Supreme Court has stated the "missing witness rule" to be that "If a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves* v. *United States,* 150 U.S. 118, 121 (1893). In that case, however, such rule was held not to be applicable to the wife of the accused, since he was under no obligation to produce her. It is submitted, therefore, that if no adverse presumption or inference under the "missing witness rule" can be raised with respect to the nonproduction of the wife as a witness, her failure to take the stand cannot be adversely commented on by the prosecution for, in so doing, it, in substance and effect, is asserting that the nonproduction of privileged testimony creates a presumption adverse to the accused.

An accused husband is possessed of the privilege to refuse to allow his spouse to testify against him and she also has the privilege not to testify. *Hawkins* v. *United States,* 358 U.S. 74 (1958). Where such privilege has been exercised, any principle which would permit an inference that the excluded testimony would be unfavorable to the party who suppressed it ought to yield, as being inconsistent with the full exercise of the privilege. VII, *Wigmore on Evidence,* McNaughton Revision, 1961, section 2243, page 259.

Thus, in *San Fratello* v. *United States, supra,* the Court stated the common law rule to be "that the mere fact of calling one's spouse as a witness for the prosecution in a criminal trial of the other for the purpose of forcing the claim of marital privilege against testifying is prejudicial error." If the foregoing be the law, then it is or should also be the law that the failure of the spouse to testify cannot be repeatedly drawn to the attention of the Jury by adverse comment thereon as was done by the following statements made by the prosecutor in summation:

> "* * * If he wants you to believe that Mrs. Fernicola gave the doctor one hundred and twenty-five thousand dollars, the way to prove it is from the witness stand, under oath, to *put Mrs. Fernicola on that stand,* and tell us how much she gave Dr. Fernicola, and other aspects about that gift to Dr. Fernicola. (451a)
>
> * * *
>
> "Well, if Mr. Querques wants us to believe that it was more than fifty thousand, *the way to prove it is from that witness stand,* under oath, * * *. (453a)
>
> * * *

"Now, if Mr. Querques wants us to believe that the doctor received five thousand dollars cash in wedding gifts at the time of his wedding, the way to prove it is from that witness stand, under oath. * * * *put on Mrs. Fernicola and just ask her one question * * * but that doesn't happen. That doesn't happen.* (453a-454a)

* * *

"* * * Well, if he wants us to believe that Dr. Fernicola got money from Giano Merlo, *put Mrs. Fernicola on the stand* to testify about it. * * *". (454a).

Here again, regardless of what the prosecutor intended or what the Presiding Judge thought the meaning of such comments to be, their only result was a natural and necessary inference *to a lay Jury* that the failure of petitioner and his wife to take the stand was a circumstance against the innocence of the petitioner permissibly to be taken into consideration in arriving at a verdict. So firmly was this inference established by a studied repetitiveness that its effect could not be erased by the general charge of the Court (263b) dealing only with the petitioner.

As stated by this Court in *Ullman* v. *United States,* 350 U.S. 422, 426 (1955), petitioner's constitutional protection "must not be interpreted in a hostile or niggardly spirit" and (*Kotteakos* v. *United States,* 328 U.S. 750, 754-765 (1946)) if on review of the asserted errors one is left in grave doubt, the conviction cannot stand.

3. Did the Prosecutor Practically Accuse Defense Counsel of Suborning Perjury in Connection With the Testimony About the Cash Hoard and Assert His Personal Belief in the Falsity of That Testimony?

Without direct reference to the portions of the prosecution's summation here complained of by petitioner, the Government states (Br. 8) that "doubtless a certain amount of acrimony did creep into this trial;" that "at one point in the trial petitioner's counsel had to be reprimanded by the Judge, outside the Jury's presence, for virtually accusing the prosecutor of lying" (R. 493a-494a); and that it "is in this setting" [all of *which*, petitioner stresses, concurred *after* summation] that the prosecutor's remarks in summation must be considered.

The Government then attempts to distinguish *Berger* v. *United States,* 295 U.S. 78 (1935) and relies upon *Lawn* v. *United States,* 355 U.S. 339 (1958) where the prosecution's statement involved was that "we vouch for" certain government witnesses "because we think they are telling the truth" which was invited by defense counsel's summation referring to the witnesses as "admitted perjurers." The Court, in overruling the taxpayer's contention, stated that the "Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the Jury."

Contrast this with prosecution's summation herein wherein defense counsel was accused of "contriving" the defense of a cash hoard. The heart of the comment was as follows:

> "* * * *Mr. Querques comes into the case in September* of this year. The case is put down

for trial. He gets a copy of the indictment, and any trial lawyer reading that indictment is going to see from the indictment that the magic number is seventy-five thousand dollars. *Any lawyer taking this case to trial has got to come up with seventy-five thousand dollars of a cash hoard prior to that first tax year, to beat the case,* so the quest goes on for seventy-five thousand dollars of nontaxable income, nontaxable funds to explain the discrepancy, to explain away all these cash expenditures * * *. (471a)

* * *

"Isn't this a last-ditch stand? *Isn't this a defense contrived for trial—and yes—I'll use the term. Isn't this manufactured evidence?* * * *" (473a)

Since there was direct testimony presented as to the existence of this cash hoard, these comments amounted to no less than an accusation that defense counsel had suborned perjury.

Thus the situation is indistinguishable from *Weathers* v. *United States,* 117 F. 2d 585, 586 (5 Cir. 1941) where the prosecuting attorney, commenting on the testimony of a government witness, stated that "It was plain to be seen that the defendant or defendant's counsel or somebody, had gotten to this woman before she was called to testify." With respect thereto, the Court stated as follows:

"The court did not reprimand the attorney for this line of argument or direct the jury to disregard it. Moreover, he did not comment upon it in his charge. The full force of this argument was left with the jury. It carried the imputation and inference that the defendant and his counsel had been guilty of reprehensible conduct by influencing the witness, Mrs. Weathers, to give false

testimony. Furthermore, the jury might have concluded from this argument that counsel for the defendant had been guilty of conduct so reprehensible as to make the argument for the defendant unworthy of consideration and belief. We are of the opinion that it was calculated to, and did, prejudice the rights of the defendant before the jury. It was the duty of the trial court to have promptly excluded this improper argument and directed the jury not to consider it. Failing in this the court committed prejudicial error. *Berger* v. *United States,* 295 U.S. 78 * * *."

It is submitted that the statement involved herein also carried the imputation and inference that defense counsel had been guilty of reprehensible conduct by submitting "manufactured evidence"—to the prejudice of the rights of the defendant before the Jury.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully prays that this Court rehear and reverse its October 10 decision to deny certiorari in this case. Counsel for petitioner is well aware of the stringent requirements of this Court's Rule 58 and desires to assure the Court that he resorts to requesting the extraordinary relief of rehearing only after careful deliberation. Counsel for petitioner believes that such rehearing is merited in this case first, in order to avoid a grave miscarriage of justice as to this petitioner, and second, because this Court has granted certiorari in the case of *Ruth Elizabeth Chapman and Thomas LeRoy Teale* v. *California,* No. 95, O.T. 1966

(Brief for Petitioners filed August 16, 1966),[1] a case involving the same question as presented in petitioner's petition, *viz.*, the constitutional propriety of comments by the prosecutor upon the defendant's exercise of his Fifth Amendment privilege to refrain from taking the stand. Moreover, this same question is presented in varying forms in two other petitions presently under consideration by this Court, *In the Matter of Kenneth Reynolds Wheaton,* No. 46, O.T. 1966 (No. 853, O.T. 1965, filed Dec. 28, 1965; renumbered 46, O.T. 1966), and *Vincent Pacelli* v. *United States,* No. 527, O.T. 1966 (filed September 6, 1966). Petitioner respectfully submits that his petition for rehearing should be granted so that this Court might utilize these cases as a vehicle for broad and comprehensive consideration of the implementation of the rule announced in *Griffin* v. *California,* 380 U.S. 609.

In *Chapman, supra,* this Court has under consideration the question of whether a violation of the rule announced in *Griffin* can ever be "harmless." Although the prosecutor's summation references to the defendants' failure to take the stand in *Chapman* are extremely blatant and fairly permeate the record, petitioner submits that the prejudice caused to him in the instant case was no less, just because the Assistant United States Attorney's comments were less direct

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[1] This case was numbered 875 Misc. in the 1965 Term. Certiorari was granted on March 26, 1966, the order stating: "The motion for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is also granted limited to the following questions: 'Where there is a violation of Griffin v. California, 380 U.S. 609, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?' The case is transferred to the appellate docket. The Chief Justice took no part in the consideration or decision of this petition."

and more subtle than in *Chapman*. This is readily seen from a comparison of some of the prejudicial summation statements in *Chapman* with the prejudicial summation statements in the instant case. For example, the prosecutor in *Chapman* stated to the jury, *inter alia:*

> "... but in their best judgment they didn't choose to get up and tell you about it, [a fact] which you certainly can consider ..." (Pet. Br., p. 16).
>
> "... the fact that they chose to rest upon whatever evidence there is in the case in chief is something that you can consider in deciding whether or not they have been fair with you." *Ibid.*
>
> "This is the chance that they take by not having taken the stand." *Ibid.*
>
> "... but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all." *Id.* at 20.
>
> "... Mr. Teale has never taken the stand in this case and testified for you." *Id.* at 23.
>
> "The only individuals that could give you that information would be the defendants, either one or both of them, ... And of course you know that you have not heard from them." *Id.* at 25.
>
> "Only two people know. They didn't tell you. That is the way they want to proceed." *Id.* at 36.
>
> "So, it is a Constitutional right, and both of these defendants have seen fit to avail themselves of that Constitutional right, but I say to you ladies and gentlemen, there are many things in this case, and I will try to point them out to you, at least some, probably not all, that these defendants are in a position to take that stand and to testify under oath and give you facts concerning. They have not seen fit to avail themselves of that opportunity." *Id.* at 93.

> ". . . who can really tell you and who could have told you from evidence, from the witness stand, what that letter meant? Well, the only one is [the defendant] . . ." *Id.* at 97.
>
> "Once again, Mrs. Chapman did not take the stand and explain these things and tell us about them as she could have." *Id.* at 101.

In the petition in the instant case, the second question presented was posed thusly:

> "2. Was not petitioner's right to be free of adverse inferences on his failure to testify violated where government counsel, in summation, made reference to the fact that petitioner's wife did not take the stand, and indirect references to petitioner's failure to testify?" (Pet., p. 2)

The question derived from these facts: the case against petitioner, a doctor, was for income tax evasion. The government attempted to prove its case by the "net worth" method (*Holland* v. *United States,* 348 U.S. 121 (1954)). Neither petitioner nor his wife (who had signed the returns in question, but who was not a defendant) took the stand. In his summation to the jury, the prosecutor referred repeatedly to petitioner's *failure to explain* a contribution that he had made to a church, thereby implying that petitioner had something to hide by not testifying. In addition, there were numerous direct and explicit comments concerning the failure of petitioner's wife to testify. The comments as to petitioner were as follows:

> ". . . *Who says* the money came from Dr. Fernicola's resources?" (438a)
>
> ". . . The only evidence we received was the evidence of a receipt of $10,000 turned over by [Dr. Fernicola to the church] . . ." (439a)

"... And in referring to some of these documents *who says* that the $10,000 came from funds of Dr. Fernicola? Referring to Dr. Fernicola's 1954 income tax return, *he didn't say so* ..." (439a)

"*Who says* the money came from Dr. Fernicola's own resources, *not Dr. Fernicola.* Well, if that $10,000 didn't come out of the pocket of Dr. Fernicola, where did it come from? And in that regard I want to call attention to the receipt printed right at the bottom of it, 'contributions deductible for income tax purposes,' and they are and should be, *but Dr. Fernicola doesn't say so.*" (440a)

"... but where did the $10,000 come from? ... Did it come from Dr. Fernicola alone, *Dr. Fernicola doesn't say so.*" (442-43a) (Emphasis added.)

Petitioner's counsel objected that the prosecutor was commenting upon petitioner's failure to take the stand. The judge overruled counsel on the ground that the remarks had reference only to what petitioner had or had not said in the tax return.

Shortly after the above comments, the prosecutor commented upon the failure of petitioner's wife to take the stand in the following words:

"... If [defense counsel] wants you to believe that Mrs. Fernicola gave the doctor one hundred and twenty-five thousand dollars, *the way to prove it is from the witness stand,* under oath, *to put Mrs. Fernicola on that stand,* and tell us how much she gave Dr. Fernicola, and other aspects about that gift to Dr. Fernicola. (451a)

"Well, if [defense counsel] wants us to believe that it was more than fifty thousand, *the way to prove it is from that witness stand,* under oath, ... (453a)

"Now, if [defense counsel] wants us to believe that the doctor received five thousand dollars cash in

> wedding gifts at the time of his wedding, *the way to prove it is from that witness stand, under oath . . . put on Mrs. Fernicola and just ask her one question . . . but that doesn't happen. That doesn't happen.*" (453-54a)
>
> ". . . Well, if he wants us to believe that Dr. Fernicola got money from Giano Merlo, *put Mrs. Fernicola on the stand to testify about it. . . .*" (454a). (Emphasis added.)

This Court said in its historic *Griffin* decision that

> "the Fifth Amendment, in its direct application to the Federal Government, and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." 380 U.S. at 615. (Footnote omitted).

There can be no question but that the prosecutor's comments, both direct and indirect, in this case violated petitioner's constitutional right under *Griffin*. The Court of Appeals for the Third Circuit, apparently deeming the violation of petitioner's rights to be "harmless," did not even resolve the *Griffin* question in its opinion, the court simply stating (per curiam) that "other points presented by appellant with respect to alleged errors at the trial do not merit discussion." (Pet., Appendix B, p. 14).

Petitioner respectfully submits that the Third Circuit in this case has done indirectly precisely what the Supreme Court of California did directly in *Chapman* (and in *Wheaton, supra,* which raises the same question as *Chapman*), i.e., the court has applied a relative "harmless error" standard to what should be an absolute constitutional right. Petitioner has been denied a fundamental constitutional right and the only way for

the denial to be redressed is through the grant of this petition for rehearing and a determination by this Court on the merits.

It is almost impossible to fully appreciate at the appellate level the pernicious effect the prosecutor's comments had on petitioner's case. The trial was a long and somewhat bitter one and, as the Government admitted in its brief in opposition, "doubtless a certain amount of acrimony did creep into this trial." (p. 8). Moreover the government's theory of guilt was built upon a "net worth" approach whereby its case developed on the basis of testimony from persons other than the taxpayer. The fact that there were many disputes between counsel on matters such as how much was paid for certain items, who paid for them, etc., placed the minds of the jurors in a perfect posture for the adverse inferences which the prosecutor tried to elicit by his references to the failure of petitioner and his wife to testify. The natural reaction of the jurors to the prosecutor's summation would be "Yes, why doesn't the defendant or his wife get on the stand and explain these things to us?"

Unless this Court speaks out on the practical application of *Griffin* to federal courts, it is submitted that government attorneys will be able to undermine this decision by resorting to the more subtle and indirect comments on a defendant's failure to testify such as are present here. Part and parcel of the implementation of this right on the trial level is the question of effective review in the courts of appeals. Since it is such a difficult task for an appellate court to ascertain precisely what prejudice a prosecutor's comments might have upon a defendant's right to a fair trial, the right to be free from adverse comment should be

made absolute as to both federal and state trials. It is only through such a drastic approach that United States Attorneys and state prosecutors will realize that resort to prejudicial comments on a defendant's failure to testify will avail them nothing. Reversal should follow automatically without the necessity of *ex post facto* inquiry into the degree of prejudice caused by the comments.[2]

CONCLUSION

WHEREFORE, Petitioner respectfully prays that the petition for rehearing be granted.

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[2] Such an approach was, in effect, adopted by the Fifth Circuit in *Davis* v. *United States*, 357 F.2d 438 (1966) (*Petition for cert. filed* on other grounds than comment question No. 245, O.T., 1966). There, the trial judge commented that defense counsel could "put your people" on the stand rather than impeach the Government witness. The appellate court commented:

> "We can think of no effect of the trial judge's comments other than to invite the jury's attention to the fact that [defendants] had not taken and did not take the witness stand. Here, no one but [the defendants] could have contradicted the Government's witness as to the events about which he had testified and upon which he was being cross-examined at the time of the trial judge's remarks." 357 F. 2d at 441.

In so deciding, the court specifically analogized comments by the court to comments by a prosecutor, finding such comments wrong from either source. *Id.* The decision of the Third Circuit in the instant case appears to be clearly in conflict with the Fifth Circuit's *Davis* decision (a fact which petitioner did not call to this Court's attention in his petition or reply Brief).

CERTIFICATION

I, Albert H. Greene, attorney for petitioner do hereby certify that this petition is presented in good faith, not for delay, and is restricted to such grounds as are encompassed by Rule 58 of this Court's Rules.

ALBERT H. GREENE